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EXAMINER

FELTON, AILEEN BAKER

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/646,930
Filing Date: August 25, 2003
Appellant(s): LEGARIO ET AL.

For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 3/7/2011 appealing from the Office action mailed 7/20/2010.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Rejected 31-33, 35, 36, 38-44, 48, 49, 51, and 53-56

Withdrawn 34 and 36

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

5,527,498	Kelley	06-1996
4,595,430	Baker	06-1986
6,113,714	Richard	09-2000

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 31, 33, 35, 36, 38, 43, 44, 48, 49, 51, 53, and 56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelley (5527498) in view of Baker (4595430).

Kelley discloses an ANFO explosive mixed by various methods for use in boreholes that comprises diesel fuel with a surfactant and ammonium nitrate.

Baker teaches that it is known to replace a portion of ammonium nitrate with an additive such as epoxidized soybean oil in an ANFO type blasting composition (col. 8 and Table II).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to use the epoxidized soybean oil as taught by Baker since Baker suggests that it is a known additive to replace a portion of ammonium nitrate in an

ANFO type blasting composition and since Kelley relates to ANFO type blasting composition that use ammonium nitrate. The oil separation is an inherent property of this composition. As to limitations which are considered to be inherent in a reference, note the case law of *In re Ludke*, 169 USPQ 563; *In re Swinehart*, 169 USPQ 226, *In re Fitzgerald*, 205 USPQ 594; *In re Best et al*, 195 USPQ 430; and *In re Brown*, 173 USPQ 685, 688.

2. Claims 39-42, 54, and 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelley (5527498) in view of Baker (4595430) as applied to claims 31-33, 35, 36, 38, 43, 44, 48, 49, 51, 53, and 56 above, and further in view of Richard et al (6113714)

Richard et al discloses details of ANFO composition with ammonium nitrate particles of size .4-2.4 mm and density from .85-1.05 g/cc (col. 6), diesel fuel (col. 4, lines 37-48) and is loaded into a borehole where it can remain from 1 hr. to 14 days prior to being detonated (col. 1, lines 25-45).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to use the ammonium nitrate particles as taught by Richard with the ANFO explosive disclosed by Kelley since Richard suggests that it is known to use particles of this size and density with ANFO explosives and also to load the boreholes a predetermined time prior to detonation in order to allow other holes to be filled prior to detonating.

(10) Response to Argument

Applicant's arguments are based on the assertion that the teachings of Baker cannot be applied in the instant case since Baker discloses a dynamite composition. This is not persuasive. First, the claims do not exclude the additional components that are included in Baker. Second, the claim limitation of "ANFO" does not exclude any additional components that are present in a dynamite composition. Third, Baker is a slurry explosive that contains both ammonium nitrate and fuel oil which is sufficient to satisfy the claim limitations.

Applicant has tried to assert that the term "ANFO" is a particular class of explosive that would exclude dynamite. The Examiner has never disagreed that dynamite includes additional components but Applicant's claims simply do not support this type of exclusion. Further, assuming arguendo, even if it is determined that "ANFO" does mean a certain type of explosive, it would be well within one of skill in the explosive art to look to other teachings in the explosive art. Not only is the patent to Baker an explosive and classified in the same class as the patent to Kelley but it is also a slurry explosive used for blasting. The Examiner has never said that Baker is an ANFO explosive at all, but that it is an "ANFO type" explosive in the sense that it does contain both ammonium nitrate and fuel oil.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). The Baker reference is not being utilized to teach the ANFO aspect of the

instant invention but merely that it is known in the explosive slurry art to replace portions of ammonium nitrate with an additive such as epoxidized soybean oil.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

In response to applicant's argument against the combination of references, the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985). The Examiner asserts that the Baker patent clearly teaches that it is known in the explosive slurry art to replace portion of ammonium nitrate with epoxidized soybean oil.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Art Unit: 1731

Respectfully submitted,

/Aileen Felton/

Primary Examiner

Conferees:

/Robert Warden/

/Jerry Lorengo/